

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
P. R. KUHL)

For Appellant: P. R. Kuhl, in pro. per.

For Respondent: John R. Akin and
Jon Jensen
Counsels

O P I N I O N

This appeal is made pursuant to section 18593 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of P. R. Kuhl against proposed assessments of additional personal income tax and penalties in the total amounts of \$7,980.37, \$9,533.01, and \$10,882.17 for the years 1977, 1978, and 1979, respectively.

Appeal of P. R. Kuhl

On his California personal income tax form 540 for the year 1977, appellant failed to disclose any information regarding his income, deductions, or credits. In the space provided for this information, appellant entered the statement: "Note: I did not receive any constitutional dollars containing 412.5 grains of silver." Appellant also noted that he objected to providing any of the relevant information based upon his Fifth Amendment privilege against self-incrimination. In his forms 540 for the years 1978 and 1979, appellant again failed to provide any information concerning his income, deductions, or credits. In the space provided therefor, appellant entered the phrase: "Object: self-incrimination."

When appellant failed to comply with respondent's demand that valid returns be filed for the years in issue, the subject proposed assessments were issued. Respondent based its estimation of appellant's income for the appeal years from the gross receipts from his medical practice, as reported on his 1976 California personal income tax return, with a 15 percent growth factor computed for each of the years in issue. The proposed assessments also include penalties for failure to file a return, failure to file upon notice and demand, failure to pay estimated income tax, and negligence. In his appeal from respondent's action in this matter, appellant has cited the Fifth Amendment privilege against self-incrimination in support of his refusal to file valid personal income tax returns; he also asserts that respondent's estimation of his income is in error.

Respondent's determinations of tax are presumptively correct, and appellant bears the burden of proving them erroneous. (Appeal of K. L. Durham, Cal. St. Bd. of Equal., March 4, 1980; Appeal of Harold G. Jindrich, Cal. St. Bd. of Equal., April 6, 1977.) This rule also applies to the penalties assessed in this case. (Appeal of K. L. Durham, supra; Appeal of Myron E. and Alice Z. Gire, Cal. St. Bd. of Equal., Sept. 10, 1969.) Where the taxpayer files no return and refuses to cooperate in the ascertainment of his income, respondent has great latitude in determining the amount of tax liability, and may use reasonable estimates to establish the taxpayer's income. (See, e.g., Joseph F. Giddio, 54 T.C. 1530 (1970); Norman Thomas, ¶ 80,359 P-H Memo. T.C. (1980); Floyd Douglas, ¶ 80,066 P-H Memo. T.C. (1980); George Lee Kindred, ¶ 79,457 P-H Memo. T.C. (1979).) In reaching this conclusion, the courts have

Appeal of P. R. Kuhl

invoked the rule that the failure of a party to introduce evidence which is within his control gives rise to the presumption that, if provided, it would be unfavorable. (See Joseph F. Giddio, supra, and the cases cited therein.) To hold otherwise would establish skillful concealment as an invincible barrier to the determination of tax liability. (Joseph F. Giddio, supra.) Since appellant has failed to provide any evidence establishing that respondent's determinations were excessive or without foundation, we must conclude that he has failed to carry his burden of proof. Finally, we find without merit appellant's assertion that his Fifth Amendment privilege against self-incrimination excuses his failure to file returns for the years in issue. The privilege against self-incrimination does not constitute an excuse for a total failure to file a return. (United States v. Daly, 481 F.2d 28 (8th Cir. 1973), cert. den., 414 U.S. 1064 [38 L.Ed.2d 469] (1973).) Moreover, a blanket declaration of that privilege does not even constitute a valid assertion thereof. (U.S. v. Jordan, 508 F.2d 750 (7th Cir. 1975), cert. den., 423 U.S. 842 [46 L.Ed.2d 62] (1975), reh. den., 423 U.S. 991 [46 L.Ed.2d 311] (1975).)

On the basis of the evidence before us, we can only conclude that respondent correctly computed appellant's tax liability, and that the imposition of penalties was fully justified. Respondent's action in this matter will, therefore, be sustained.

Appeal of P. R. Kuhl

O R D E R

Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 18595 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protest of P. R. Kuhl against proposed assessments of additional personal income tax and penalties in the total amounts of \$7,980.37, \$9,533.01, and \$10,882.17 for the years 1977, 1978, and 1979, respectively, be and the same is hereby sustained.

Done at Sacramento, California, this 10th day of December, 1981, by the State Board of Equalization, with Board Members Mr. Dronenburg, Mr. Reilly, Mr. Bennett, Mr. Nevins and Mr. Cory present.

Ernest J. Dronenburg, Jr., Chairman

George R. Reilly, Member

William M. Bennett, Member

Richard Nevins, Member

Kenneth Cory, Member

In the Matter of the Appeal of)
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Upon consideration of the petition filed January 4, 1982, by P. R. Kuhl for rehearing of his appeal from the action of the Franchise Tax Board, we are of the opinion that none of the grounds set forth in the petition constitute cause for the granting thereof and, accordingly, it is hereby ordered that the petition be and the same is hereby denied and that our order of December 10, 1981, be and the same is hereby affirmed.

William M. Bennett, Chairman
George R. Reilly, Member
Ernest J. Dronenburg, Jr., Member
Richard Nevins, Member
_____, Member